the day of publication of the said bankruptcy notice in the *Sarawak Government Gazette*.

In our view the second part of the order relates clearly to the first part of the order. The date of publication in the *Sarawak Government Gazette* was made the effective date for reason that such publication would inevitably be carried out at a date much later than the date of the publication in the *Sarawak Tribune* by which time the whole of the order contained in the first part would have been carried out and only then that the bankruptcy notice shall be deemed to have been duly served on the debtor — (BR110(2)).

The central issue here is what constitutes sufficient service of the bankruptcy notice when effected by way of substituted service. In this regard two elements must be considered — (a) the term of the order and (b) the form to be used.

Looking at the order it may appear that it is the term of the order that the bankruptcy notice itself be published but what we also have to consider is whether the term of the order could be satisfied by causing the publications to be made in a manner in conformity with the form provided.

The rule provides a certain form to be used when effecting service of the bankruptcy notice by way of substituted service and that form is Form 15.

The question is whether by using the form provided sufficient service of the bankruptcy notice could be effected. In this respect we bear in mind that the method of substituted service should, in all reasonable probability, if not certainty, be effected to bring knowledge of the bankruptcy notice or the notice of the bankruptcy notice to the debtor. (see *Porter* v. *Freudenberg*[1]); (see also *Kamaruddin bin Mohamed* v. *United Motor Works (M) Sdn. Bhd.*[2]).

In the instant case, the publication was made to conform with Form 15 as provided in the Appendix. The question that calls for consideration is whether such publication was sufficient and regular. To answer the question it is necessary to determine whether the publication produced the desired effect, namely, that it brought to the knowledge of the debtor the bankruptcy notice.

It may be appropriate to note that BR4 which provides for the use of Form 15 states —

"4. The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used...."

The form applicable to BR97 and BR110(2) is Form 15 and it is not in dispute that the publication both in the *Sarawak Tribune* and the *Sarawak Government Gazette* was in conformity with Form 15. The main complaint is that the bankruptcy notice itself was not published. We see no merit in the argument for reason that the method employed to effect the substituted service was not, in our view, inconsistent with the term prescribed by the order. It was clearly set out in the publication that the bankruptcy notice had been issued in the High Court at Kuching, and that the bankruptcy notice could be inspected by the debtor at the court. This was sufficient, in our view, to bring knowledge of the bankruptcy notice or notice of the bankruptcy notice to the debtor. In consideration we see no irregularity whatever indeed we find that the publication did produce the desired effect. In our judgment the bankruptcy notice was duly served on the debtor. Finally we find that there is no necessity to invoke section 131 of the Bankruptcy Act. We therefore allow this appeal with costs both here and in the court below. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

HON CHEE ENTERPRISE v. BRITISH MARKITEX LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Syed Othman & Abdul Hamid F.JJ.) October 14 & November 6, 1981]

[Kuching — Federal Court Civil Appeal No. 135 of 1981]

Bills of Exchange — Bills dishonoured and protested for non-payment — Bills returned to original drawers — Action against acceptors of bills — Whether drawers entitled to obtain judgment against acceptors — Bills of Exchange Act 1949 (Act 204), ss. 29(3), 38, 54(a) & 61.

The respondents were the drawers and payees of and the appellants the acceptors of four bills of exchange which were subsequently negotiated. When the bills were presented for payment they were dishonoured and were duly protested for non-payment. As a result the bills were returned to the respondents, the original drawers and payees, who became the holders of the bills. They sued the appellants as acceptors of the bills. In their defence the appellants alleged that the respondents were not entitled to the claims under the bills. The respondents obtained summary judgment against the appellants and this was confirmed in the High Court. The appellants appealed.

Held, dismissing the appeal: (1) the drawer of a bill of exchange who after negotiating it and who later becomes a holder of the bill following the dishonour of the bill by non-payment is entitled to sue the acceptor of the bill;

(2) by accepting the bills in this case the appellants promised or engaged that they will pay the bills according the tenor of their acceptance and as they have failed to honour their promise, they were liable to the respondents who had become holders of the bills.

Cases referred to:-

(1) *Jade International* v. *Robert Nicholas Ltd.* [1978] 3 All E.R. 104; [1978] 3 W.L.R. 39.

(2) *R.E. Jones Ltd.* v. *Waring & Gillow* [1926] A.C. 670, 680.

(3) *Sutters* v. *Briggs* [1922] 1 A.C. 1.

FEDERAL COURT.

Chong Siew Chiang for the appellants.

Chew Pok Oi for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): The only question in this appeal is the right of respondents to sue appellants in their own name in respect of four bills of exchange.

Briefly, the respondents were the drawers and payees of and the appellants the acceptors of the said four bills which were subsequently negotiated. When the bills were presented for payment they were dis-

honoured and were duly protested for non-payment. As a result, they began their journey backwards to respondents, the original drawers cum payees, who became the holders of the bills. They sued appellants as acceptors of the bills. In their defence appellants alleged that respondents were not entitled to the claims under the bills. Respondents obtained summary judgment under Order 14 rule 2 of the Rules of the High Court, 1980. The learned judge confirmed his decision after hearing further argument in open court. Appellants appealed.

Respondents discounted the first bill No. 2984G dated March 18, 1980 for S$19,859.97 with Barclays Bank International Ltd. which sent the bill with the endorsement "For collection only without recourse. Pay to the order of Kwong Lee Bank Berhad." The second bill No. 2934J dated March 7, 1980 for M$15,247.93 was also discounted with the said Barclays Bank which in turn discounted it by endorsing "Pay to the order of Kwong Lee Bank." The third bill No. 2868A dated February 26, 1980 for £2,387.97 was discounted with Hongkong and Shanghai Banking Corporation, which in turn discounted it by endorsing "Pay to the order of Kwong Lee Bank Bhd." The fourth bill No. 005G dated April 15, 1980 for S$46,158.97 was discounted with the Standard Chartered Bank which endorsed it with the words "Pay to the order of any bank or trust company. For collection only." Eventually, Kwong Lee Bank Bhd. became the holders of the four bills. As stated they were dishonoured on presentation on due dates and protested pursuant to the right of recourse under section 47(2) of the Bills of Exchange Act 1949 — Act 204 (Revised — 1978).

Appellants' contention is that only Kwong Lee Bank Bhd. can sue as they are the holders as well as payees and endorsees. Appellants say respondents are not holders. In order to make respondents holders Kwong Lee Bank Bhd., so appellants argue, must re-open the endorsement, that is to say, re-endorse the bills to respondents. As there has been no such endorsement on any of the bills it is appellants' submission that respondents have no right to sue. They were right to say that endorsement is a matter of vital importance since bills are negotiable instruments and the rights of various parties to bills depend on the validity and regularity or otherwise of the endorsement. For this reason they fear that they would not discharge their liability if they pay the wrong party.

Respondents' contention is that endorsement is irrelevant in this case as the bills were protested for non-payment and were sent down the line until they reached respondents, the original drawers and payees. Section 2 of the Act defines "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. Respondents fall within the meaning of "holder" and therefore have the right to sue under their own name under section 38 of the said Act.

All the points raised here were also before the learned judge. He was of the view that under section 29(3) respondents were holders of the bills and could sue in their name by virtue of section 38. Section 29(3) reads: —

> "A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

Section 38(a) makes it clear respondents as holders have the rights and powers to sue in their own name. The obligation of appellants is stated in no uncertain terms under section 54(a). By accepting the bills appellants promise or engage that they will pay the bills according to the tenor of their acceptance. Appellants have failed to honour their promise.

On the question of endorsement this point was answered by the case of *Jade International* v. *Robert Nicholas Ltd.*[1] At page 108 this passage is relevant: —

> "They in their turn discounted the bill to the Deutsche Bundesbank, and the Deutsche Bundesbank in turn apparently discounted the bill to the Midland Bank Ltd. That bank then presented the bill for acceptance. It was duly accepted. It was presented for payment after the 120 days had elapsed and as I have already said it was dishonoured at that stage. The Midland Bank Ltd., it having been discounted to them, and assuming it was so discounted as it seems to have been, were holders in due course, and when it arrived to them there was no further transfer. If one looks at the reverse side of the bill one sees that the Midland Bank simply opened the endorsement; then it was passed back down the line inoculated, so to speak, with the title of the Midland Bank. The intermediate bankers had given value for the bill and that made them holders in due course, which gave them under the sections to which I have already drawn attention rights against the acceptors. So the bill goes back through the Deutsche Bundesbank to the Sparkasse: Sparkasse debited the plaintiffs' current account, and counsel for the plaintiffs submits, thereby they give value for the bill, although plainly on the terms of section 29(3), which I have already read, it does not matter whether they gave value or not, it does not affect their situation as holders."

No particular emphasis was placed on the opening endorsement. If such was necessary then the two immediate banks would also have to open endorsements. They did not as it was not necessary. In other words, neither endorsement nor opening is necessary when bills make their way back to the original drawer. The bills were out for collection only. No endorsement is necessary as all the bills were endorsed for collection "for and on behalf of British Markitex Ltd." We cannot see how appellants should fear that their liability would not be discharged in the present case. For if they pay they can expect to get the bills and become the holders then the bills will be discharged. Further, section 61 of the Act provides clearly that: —

> "61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged."

It is not in dispute that respondents fall within the meaning of transferees and their right to have the endorsement of the transferor is preserved under section 31(4). Appellants say for the provision of section 31(4) to apply, the transferees must come within the definition of a holder under section 2 of the Act. Since the bills have gone back to respondents and are in their possession they become holders. An original payee is not holder in due course. The delivery of a cheque to the original payee is not a negotiation. See *R.E. Jones Ltd.* v. *Waring & Gillow.*[2] The learned judge was quite right to say as holders they have the right to sue in their own name. The term

"holder" includes (i) the original payee of a bill, and (ii) a banker who is a mere agent for collection: *Sutters* v. *Briggs,*[3] a decision on the term "holder" in the Gaming Act, 1855, section 2 (repealed), but the definition of the term was argued and adjudged with reference to the Bills of Exchange Act, 1882.

The learned judge relied on the *Jade International* case[3] which he considered to be an authority for the proposition that a drawer of a bill of exchange who after negotiating it and who later becomes a holder following the dishonour of the bill by non-payment is entitled to sue defendant as acceptor of the said bill. Further, the English Bills of Exchange Act, 1882 is substantially identical to our Bills of Exchange Act, 1949 — Act 204 (Revised — 1978). We have no reason to interfere with the decision of the learned judge that respondents have the capacity to sue appellants. Accordingly, we would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Chong Brothers; Chan, Jugah, Wan Ullok & Co.*

YAP PHOOI YIN & ANOR. v. C.M. BOYD

[F.C. (Raja Azlan Shah Ag. L.P., Lee Hun Hoe C.J. (Borneo) & Mohamed Azmi J.) November 3 & 13, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 135 of 1978]

Landlord and Tenant — Lease — Construction of — Relative importance of recital and operative part — Rent payable — Special case referred to High Court.

Arbitration — Special case referred to High Court.

In this case the proprietor of the land executed a lease of the land to the lessee. A cinema had been erected on the land by the lessee at his own expense some time before the execution of the said lease.

The recital of the lease stated that "the said land together with the buildings erected thereon and known as Star Theatre" was leased to the lessee for 30 years at a monthly rental as stated in the lease. The operative part of the clause provided that "the rent of the said land" shall from the beginning of the 21st year to the end of the 25th year be such sum as shall be agreed to by the parties or as shall be fixed by an arbitrator.

As there was disagreement as to the rent, the matter was referred to arbitration. The respondent as arbitrator gave his final award but referred it to the High Court in the form of a special case as follows:—

> "(1) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land only the fair rental under Clause 1(iv) of the said lease is $5,000 per month.
>
> (2) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land together with the buildings erected thereon the fair rental under Clause 1(iv) of the said lease is $21,000 per month."

Harun J. in the High Court answered the reference with the words "on the land only". The appellant appealed.

Held, allowing the appeal: (1) in the present case the recital of the lease was clear and particular while the operative part was ambiguous. The recital which is clear must determine the operative part which appears ambiguous;

(2) the rental should therefore relate to the land and the buildings erected thereon.

Cases referred to:-

(1) *Larrinaga & Co.* v. *Societe France-Americaine* (1923) 92 L.J.K.B. 455; 125 L.T. 65.

(2) *Ponsford & Ors.* v. *H.M.S. Aerosols Ltd.* [1978] 2 All E.R. 837.

(3) *Ex parte Dawes, In re Moon* (1886) 17 Q.B.D. 275, 286.

FEDERAL COURT.

Wong Chong Wah for the appellants.

M. Shankar for the respondent, Goh Eng Wah.

C. Das for the respondent — arbitrator.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P. (delivering the judgment of the Court): In this appeal the question arises as to the construction of a lease executed on August 16, 1957 and it turns upon the relative importance of a recital and the operative part of the said lease in clause 1(iv) infra. The recital states that the registered proprietor of land held under C.T. No. 15741 for lot No. 573, section 62, in the town of Kuala Lumpur, in area 0 acres 2 roods 27.9 poles (hereinafter referred to as "the said land") do hereby lease to Makhanlall (Properties) Ltd. the said land together with the buildings erected thereon and known as Star Theatre as tenant for 30 years at a monthly rental as stated hereinafter, subject to the agreement and powers implied in the Land Code and subject to the stipulations, modifications, terms and conditions hereinafter contained. Then the lease continues with the operative parts. Clause 1 contains the provisions for rent. It reads:

"The rent of the said land shall be as follows:—

(iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding $700 as shall be agreed to by the parties hereto or as shall be fixed by an arbitrator."

Clause 2 says that the rent shall be payable in advance.

Clause 3 contains the lessee's usual covenants for the maintenance of the Star Theatre, insurance of the said building in the joint names of the lessor or lessee, entry of the premises to view the state of repairs and provisions against assignment, sub-letting or part with possession without consent, and delivery of vacant possession with all fixtures fittings and additions. Clause 4 contains the lessor's covenants for quiet and peaceful enjoyment and option for renewal. Clause 5 provides for determination of the lease and taking possession of the said cinema and all other buildings erected by the lessee on the said land when rent is unpaid in certain circumstances. Clause 6 provides for the suspension of rent when the lessee is unable to operate or use the said cinema by reason of war, riot, civil commotion or fire. Clause 7 provides for arbitration in case of dispute or difference between the parties.

It is common ground that the said cinema was erected by the lessee at his own expense some time before the execution of the said lease. Both the signatories are now dead. There is now a dispute as to the amount of rent payable in the light of clause 1(iv). The matter went to arbitration. The arbitrator gave his final award (see *Larrinaga & Co.* v. *Societe*